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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 296

SAMUEL R. HOCHMAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Petitioner prays that this Court grant a rehearing of its Order of October 10, 1960, denying the petition for writ of certiorari, ... U.S. ....., and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit in the above-entitled case, as prayed for in the petition filed August 4, 1960, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

No legal determination as to the obscenity or non-obscenity of the books in issue has ever been made, either in the Trial Court, or in the Appellate Court. In the Trial Court, the issue was presented to the jury, but because of the evidentiary rulings of the Trial Court, the jury had no standards by which to judge the books, other

than purely subjective ones. The Court of Appeals declined to consider the issue of obscenity of the publications, and also declined to rule upon the claimed errors in the rulings of the Trial Court relating to the exclusion of testimony and evidence designed to guide the jury in their determination of the contemporary community standards.

Petitioner contends and strongly urges the Court that upon the issue of obscenity of the books involved herein, petitioner has not had his "day in Court." Mr. Justice Harlan, in *Roth* v. *U.S.*, 354 U.S. 476, at Pages 497, 498, stated:

> "The suppression of a particular writing or other tangible form of expression is an individual matter, and in the nature of things every such suppression raises an individual constitutional problem, in which a reviewing Court must determine for itself whether the attacked expression is suppressible within constitutional standards. Since those standards do not readily lend themselves to generalized definitions, the constitutional problem in the last analysis becomes one of particularized judgments which appellate courts must make for themselves.
>
> "I do not think that reviewing Courts can escape this responsibility by saying that the trier of the facts, be it a jury or a judge, has labeled the questioned matter as 'obscene' for, if 'obscenity' is to be suppressed, the question whether a particular work is of that character involves not really an issue of fact but a question of constitutional judgment of the most sensitive and delicate kind."

In *Kingsley International Pictures Corp.* v. *Regents*, 360 U.S. 684 at 696, Justice Frankfurter stated: "We cannot escape such instance-by-instance, case-by-case application of that clause in all the varieties of situations

that come before this Court", and Mr. Justice Harlan, in the same case, at Page 708, spoke of " . . . the necessity for individualized adjudication. In the very nature of things the problems in this area are ones of individual cases. . . ."

It should be noted that the Court, in *One, Inc.*, v. *Oleson*, decided January 13, 1958, 355 U.S. 371, and *Sunshine Book Co.* v. *Summerfield*, decided the same day, 355 U.S. 372, apparently followed this principal in summarily reversing the lower Court on the authority of *Roth* v. *U.S.*, *Supra*.

The exclusion by the Trial Court of the proffered testimony of the local Vice-Squad Officer that the same or similar books which were the subject of the indictment and conviction of petitioner, were being sold openly and extensively in the City of Milwaukee at the time of the alleged offense, denied to the jury an essential guide-post in the determination of the contemporary community standard and, therefore, affected their determination of obscenity or non-obscenity of the publications.

Petitioner contends that the theory of the Trial Court in excluding the Vice-Squad Officer's testimony was clearly erroneous. To illustrate, at Page 145 of the transcript, the Court said:

> "Well, on that theory, if there is gambling going on fairly openly in the community, a man can just walk in a gambling den and participate and say he didn't know there was anything wrong about it; or he can go in an immoral house. 'Why, other people are doing it. I don't see anything wrong about it.' It is doing it in the open."

It is evident that the Trial Court treated such testimony in the nature of a defense, rather than for the purpose

for which it was introduced. The fallacy of the Court's logic lies in the fact that whereas actions cited by the Court are illegal *per se*, buying or receiving books in interstate commerce is not an illegal act in itself. Gambling is illegal; prostitution is illegal; speeding is illegal; adultery is illegal; no amount of official laxity in enforcing the statutes or ordinances making such conduct illegal can be an excuse or defense for one charged with such crimes. Bookbuying, however, is not illegal *per se*; only the buying of *obscene* books is illegal. If books are sold openly and extensively, a presumption exists that such books are not obscene, and any judicial determination as to their obscenity must take into account the fact of their locally wide circulation as a factor in determining contemporary community standard.

It is contended that titles and covers of publications, although suggestive, do not make such publications obscene. In a very recent case, *People v. Richmond County News, Inc.*, 205 N.Y.S. 2nd 94, decided July 11, 1960, holding that the mere showing that a magazine distributing corporation was aware of a magazine cover and title is not sufficient proof of scienter to justify conviction, the Court said: "Such external displays and title do not necessarily invite further inquiry or investigation; they constitute an inadequate basis on which to impute knowledge . . . of the contents of the magazine."

This is the predicament facing booksellers throughout the country: A Book is ordered, or offered for sale by publisher, bearing a provocative cover and title. Bookseller reads the book to satisfy himself as to its legitimacy for re-sale to the public. The bookseller, after reading said book, determines that it is not obscene, but being a careful and prudent man, makes a survey of other booksellers in his own city and elsewhere. This investigation

discloses that the identical book is and has been on sale everywhere for several years, and no problems of any nature have arisen concerning said book. The bookseller proceeds a step further, and consults the publisher as to the nature and character of said book and specifically inquires as to whether there has been any problem anywhere in connection with said book. The publisher, who has been in business, troublefree, for 30 years, assures the bookseller that the book has been sold for years throughout the country and, no problems have arisen. Bookseller thereupon purchases said book for re-sale and finds himself subject to an indictment and prison term for receiving said book.

What yardstick can the bookseller use to determine what he may or may not order and sell. If the book is what is classed as "hard core pornography" there is naturally no problem. But, if the book is in the nature of thousands of similar books sold on newsstands and in bookstores throughout the country, what rule can guide this bookseller. That is the dilemma which faces book sellers generally and the petitioner particularly. The uncontroverted testimony discloses that the identical books, the receipt of which has subjected him to 18 months imprisonment, were on sale extensively throughout the city in which he did business and generally throughout the country. That they had been sold openly for several years and petitioner received assurance of the publisher that no problems in relation to said books had or could arise. It is also undisputed that the covers and the prices of said books were identical to 65 other books which were originally seized by the F.B.I. and subsequently returned to petitioner for re-sale. It seems to petitioner to be axiomatic that testimony of law enforcement officers of the

existence of the factors stated above to be clearly admissable to show the contemporary community standards and scienter. "The community cannot, where liberty of speech and press are an issue, condemn that which it generally tolerates." Justice Harlan, *Smith* v. *California*, 361 U.S. 147, at Page 174.

Since this Court denied petitioner's petition for certiorari on October 10, 1960, certiorari was granted in the case of *Mapp* v. *Ohio*, 166 N.E. 2nd 387. This latter case contains questions of scienter which are similar to the case at bar, and it is hoped that the determination in *Mapp* v. *Ohio* may have a bearing upon the issues presented herein.

CONCLUSION.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Seventh Circuit.

Respectfully submitted.

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CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

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